No. 19-01

In the Supreme Court of the United States

MARY GULDOON,

Petitioner,

v.

STATE OF LACKAWANNA BOARD OF PAROLE

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 32
Counsel for Petitioner

QUESTIONS PRESENTED

I. Did the lower court err by holding that Lackawanna's Registration of Sex Offenders Act ("ROSA") does not violate the First and Fourteenth Amendments of the United States Constitution?

II. Did the lower court err by holding that Lackawanna's Registration of Sex Offenders Act ("ROSA") does not violate the Ex Post Facto Clause of the United States Constitution?

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STATEMENT OF FACTS

Mary Guldoon plead guilty in 2011 to one count each of rape in the third degree, criminal sexual act in the third degree, and sexual misconduct. R. at 2. Mrs. Guldoon was caught engaging in sexual acts with B.B., one of her students, by the principle of the high school where she worked. R. at 5. The abuse occurred mostly at school and a few times in her home. R. at 5. B.B. and Guldoon communicated through email and text messages, however these correspondences did not have any obscene or pornographic material contained in them. R. at 5-6. Mrs. Guldoon was sentenced to an indeterminate sentence of ten to twenty years, followed by parole. R. at 2. The Board of Parole suggested General Conditions of parole to be applied to Mrs. Guldoon after incarceration. R. at 7. These General Conditions did not impose any type of registration requirement. R. at 8-10.

While Mrs. Guldoon was still in prison, the Governor of Lackawanna signed the Registration of Sex Offenders Act ("ROSA"). R. at 2. ROSA made substantial changes to the Correction Law, the Penal Law, and the portion of the Executive Law that describes the duties of the Board of Parole. R. at 19, 23. The changes include a new registration requirement and new Special Conditions of parole for certain offenses. R. at 2, 3. ROSA requires individuals convicted of "sex crimes" to register with the State and assigns risk levels that correspond to an individual's particular crime. R. at 2, 37. The stated purposes of ROSA are to protect the public from sex offenders who commit predatory acts against children, prevent recidivism and victimization, and assist local law enforcement. R. at 19-21. ROSA requires these new procedures to be monitored by Criminal Justice Services, the courts, the Board of Parole and the police. R. at 19-21. The information collected by these agencies is intended to aid law enforcement in activities such as investigating and prosecuting sex offenders. R. at 19.

Mrs. Guldoon was released on parole in 2017. R. at 2. Due to ROSA, Mrs. Guldoon is now required to register as a level two sex offender, she is prohibited from accessing commercial social networking websites, her driver's license has been revoked, and she is prohibited from traveling within 1,000 feet of a school. R. at 3, 9, 14. None of these requirements were imposed on Mrs. Guldoon until the passage of ROSA. R. at 2, 14. These new requirements make it nearly impossible for her to find a job because she cannot access most websites where employment opportunities are posted or job applications are accepted. R. at 15-16. Since Mrs. Guldoon cannot use the internet to access these type of websites, her family is also barred because they live in the same home. R. at 16. Additionally, Mrs. Guldoon must take a treacherous twenty mile route to work because the quicker three mile routes have schools on their path. R. at 15-16. This requires Mrs. Guldoon to ride her bicycle on a 65 mile per hour highway, sometimes in frigid temperatures, since the rural area she lives in has infrequent public transportation. R. at 16. If Mrs. Guldoon violates any of ROSA's requirements, she can have her parole revoked and be sent back to prison. R. at 44. Moreover, Ms. Guldoon is prohibited from petitioning to be relieved of any further duty to register until she has been registered for thirty years. R. at 40-41.

SUMMARY OF THE ARGUMENT

First, this Court should reverse the lower court's ruling for two reasons. First, Lackawanna's Registration of Sex Offenders Act ("ROSA") violates Mrs. Guldoon's First and Fourteenth Amendment rights. The Special Condition against accessing commercial social networking websites should be analyzed using the intermediate scrutiny standard. Under intermediate scrutiny, the Special Condition burdens substantially more speech than necessary to achieve the Government's interest of protecting the public from sex offenders who commit predatory acts against children, which violates Mrs. Guldoon's First Amendment right to freedom of speech.

Furthermore, ROSA violates Mrs. Guldoon's Fourteenth Amendment rights by infringing on both her fundamental and protected rights. The Special Condition against traveling within 1,000 feet from a school is both void for vagueness and infringes on her fundamental right to intrastate travel. The prohibition could not easily be determined as a violation by an ordinary person, and the prohibition is not narrowly tailored to meet the Government's interest of protecting the public. Moreover, the Special Condition prohibiting Mrs. Guldoon from obtaining a driver's license violates her Fourteenth Amendment rights because the Legislature has failed to provide any reason as to how the prohibition is related to the Government's interest of protecting the public.

Second, this Court should reverse the lower court's ruling that ROSA does not violate the Ex Post Facto Clause. In examining whether a statute violates the Ex Post Facto Clause, this Court should adopt a two-part test which asks (1) whether the Lackawanna Legislature intended for ROSA to be a civil statute and (2) if the Legislature intended to enact a civil statute whether ROSA is so punitive either in purpose or effect as to negate the Legislature's intention to deem it civil.

The Lackawanna Legislature intended for ROSA to be punitive because despite their stated purposes being to prevent recidivism and victimization, assist law enforcement agencies, and protect the community, ROSA provides substantive amendments to parole. ROSA is regulated and dependent upon the cooperation of Criminal Justice Services, the courts, the Board of Parole, and law enforcement which suggests that the Legislature's intent was to implement a punitive regime. However, even if this Court finds that the Legislature intended to enact a civil regime, it is so punitive in its effects that the Legislature's stated intent should be negated. ROSA is punitive in its effects because it directly imposes new special conditions on parole, increased Mrs. Guldoon's registration requirements from non-existent to life, prohibits her from driving a vehicle and being closer than 1,000 feet from a school. Thus, this Court should find that ROSA violates the Ex Post Facto Clause.

ARGUMENT

I. The lower court erred by holding that ROSA does not violate the First and Fourteenth Amendments.

A person on parole is not denied their constitutional rights just because of their status as a parolee. *United States v. Hallman*, 365 F.2d 289, 291 (3d Cir. 1966). However, parolees do have fewer constitutional rights than regular citizens. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). The First Amendment states that, "Congress shall make no law…abridging the freedom of speech." U.S. CONST. amend. I. When evaluating a statute under First Amendment claims, this Court must first determine what level of scrutiny should be used based on the speech the statute is restricting. Furthermore, the Fourteenth Amendment states that, "no State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Under a Fourteenth Amendment analysis, this Court must look at the type of interest being infringed upon to determine the appropriate level of scrutiny.

This Court should reverse the lower court's holding that the Special Conditions of Parole imposed by ROSA do not violate the First and Fourteenth Amendment for three reasons. First, the Special Condition prohibiting access to commercial social networking is not narrowly tailored to meet the Government's interest. Second, the Special Condition prohibiting individuals from going within 1,000 feet of a school is void for vagueness and not narrowly tailored to meet the Government's interest. Third, the Special Condition prohibiting a convicted sex offender from obtaining a driver's license is not reasonably related to the Government's interest.

A. ROSA burdens substantially more speech than necessary to further the Government's interest.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Courts have found that some of the important places for individuals to exchange views include

streets, parks, and even cyberspace. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997). This Court has held that social media users utilize websites like Facebook, Twitter, and LinkedIn to engage in an array of protected First Amendment activities. *Packingham*, 137 S. Ct. at 1735.

In determining what level of scrutiny is applied to a statute being challenged under the First Amendment, it must first be decided if the statute is content-neutral or content-based as this Court did in *Packingham v. North Carolina*. *Id*. at 1732. A statute that is content-based "suppresses, disadvantages, or imposes" different burdens upon speech because of its content, which requires strict scrutiny to be applied. *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 641-42 (1994). However, content-neutral statutes are those that are unrelated to the content of the speech and require intermediate scrutiny to be applied. *Id.* at 42. The Special Condition prohibiting sex offenders from accessing social networking websites is content-neutral since it is unrelated to the content of the speech. Therefore, this Court should apply intermediate scrutiny. Intermediate scrutiny requires that the law be "narrowly tailored to serve a significant government interest," thus the law must not "burden substantially more speech than necessary to further the government's legitimate interest." *McCullen v. Coakley*, 573 U.S. 464, 484-86 (2014).

In *Packingham*, North Carolina made it a felony for a registered sex offenders to access commercial social media sites that the offender knew minors were allowed to access or maintain a page. *Packingham*, 137 S. Ct. at 1733. Packingham, a registered sex offender, was prosecuted under the law for making a post on Facebook about his experience in traffic court. *Id*. at 1734. This Court held that the statute was content-neutral and used intermediate scrutiny to analyze the law. *Id*. at 1736. The State argued that the law had to be broad to keep sex offenders away from vulnerable victims. *Id*. at 1737. However, this Court ruled that the State did not meet their burden of showing that the law was necessary or legitimate to serve that purpose. *Id.* This Court ruled that the law violated the First Amendment because it completely barred the exercise of First

Amendment speech on websites "integral to the fabric of our modern society and culture." *Id*. at 1738.

In *Mutter*, Ross challenged the constitutionality of a special condition of his parole which prohibited him from having contact with any electronic devices with internet access. *Mutter v. Ross*, 811 S.E.2d 866, 870 (W.Va. 2018). Ross argued that in light of *Packingham v. North Carolina*, the special condition violated his First Amendment rights. *Id*. The State offered no explanation for the broad ban on internet access and how it would protect the public from misconduct that would result from Ross's internet use. *Id.* at 873. Additionally, the State failed to provide a reason for why the State's legitimate interest could not be furthered through less restrictive means, such as monitoring computers. *Id*. The court ruled that the special condition of parole was clearly unconstitutional in light of this Court's ruling in *Packingham v. North Carolina*. *Id*.

Contrasting *Mutter*, *United States v. Rock* held that a special condition prohibiting Rock from possessing or using computers was not plain error in light of *Packingham*. *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017). The court held that there was no plain error because Rock's condition was part of his supervised-release sentence, and not a post-custodial restriction. *Id.* However, it is important to note that the crime Rock committed included installing a hidden camera in a child's bedroom and sending sexually explicit photos of children on internet chat rooms. *Id.* at 829.

Here, similar to *Packingham*, ROSA prohibits convicted sex offenders from using the internet to access commercial social networking websites. R. at 25. A commercial social networking website is defined as "any…entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users." R. at 25. This law, similar to *Packingham*, effectively prohibits Mrs. Guldoon

from accessing most websites that require registered users. Furthermore, the Legislature has failed to provide a necessary or legitimate governmental interest. The Legislature contends that this law is to be put in place because "in the hands of a sexual predator intent on harming minors, social networking websites … pose a clear and present danger." R. at 20. However, in the same breath they admit that individuals on parole face a barrier to gaining employment, thus any measure that restricts an offender's use of the internet must be tailored to specifically target the types of offenses committed on the internet while not making it impossible for such offenders to successfully reintegrate back into society. R. at 21. Lackawanna has effectively gone against their own word. This law makes it impossible to use websites like LinkedIn or Indeed, which have become essential to modern day job searching, which hinders Mrs. Guldoon from effectively integrating back into society.

Similar to *Mutter*, Mrs. Guldoon's offense had nothing to do with the internet. The abuse that happened between Mrs. Guldoon and B.B. occurred in the classroom and in her home. R. at 6-7. The only contact Mrs. Guldoon had with B.B. that involved the internet was through emails that were void of pornographic material and sexual communication. R. at 5-6. The contact through the internet also did not facilitate the abuse. This is unlike *Rock*, where the offender used the internet to facilitate his crime. Rock used the internet to record and send pornographic material of minors on the internet. Most of the abuse that happened between Mrs. Guldoon and B.B. occurred in person and not via the internet.

Prohibiting level two sexual offenders from accessing commercial social networking websites is not narrowly tailored to meet the Government's interest. The Government's interest is to protect the public from sex offenders who commit predatory acts against children. R. at 20. There are various other ways that Lackawanna can accomplish this interest without a sweeping ban on First Amendment Rights. As suggested in *Packingham*, Lackawanna could monitor the

computers of sex offenders as a less restrictive means. It has already been shown that there are other less restrictive possibilities, because Lackawanna's Attorney General made an agreement with a large social networking website to create a new model to "enforce safeguards aimed at protecting children and adolescents from sexual predators, obscene content and harassment" in 2007. R. at 20. The Legislature could allow individuals to use websites whose main purpose is to facilitate employment opportunities and still require offenders to disclose all of their information on the website to Lackawanna. This provision is possible since Lackawanna does require lower level sex offenders to register their internet identifiers with law enforcement. R. at 21. Therefore, the condition banning sex offenders from accessing commercial social networking websites is not narrowly tailored to meet the Government's interest since it is a sweeping ban on all forms of speech and not related to Mrs. Guldoon's crime.

B. ROSA violates the Fourteenth Amendment right to due process.

The Fourteenth Amendment's Due Process Clause guarantees more than simply fair process. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Clause also includes a substantive component that provides a heightened protection against government interference with certain fundamental rights and liberty interests. *Id.* The Fourteenth Amendment not only gives a procedural guarantee against the deprivation of "liberty," but likewise protects substantive aspects of liberty against unconstitutional restrictions by the state. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

This Court has held that the Constitution protects a fundamental right to travel within the United States. *Saenz v. Roe,* 526 U.S. 489, 500 (1999). When a regulation infringes upon a constitutionally protected right, courts apply strict scrutiny, which requires the government to show that the regulation is narrowly tailored to serve a compelling governmental interest. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007). However, when state action does

not affect a fundamental right, the proper standard of scrutiny is rational basis. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

1. The Special Condition that Mrs. Guldoon remain 1,000 feet from a school is void for vagueness and is not narrowly tailored.

The vagueness doctrine comes from the Due Process Clauses of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV; *State v. Castaneda*, 245 P.3d 550 (Nev. 2010). A statute will be considered void for vagueness if it does not allow a person of ordinary intelligence to determine what conduct is prohibited or if it authorizes arbitrary enforcement. U.S. Const. amend. XIV; *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

In *Doe v. Snyder*, the court invalidated Michigan's sex offender law that made it a crime for sex offenders to "work, 'loiter', or reside 'within a student safety zone'" that included the area 1,000 feet or less from school property. *Doe v. Snyder*, 101 F. Supp. 3d 672, 682 (E.D. Mich. 2015). The court ruled that the law did not clarify how to measure the 1,000 feet, thus plaintiffs could not know where the zones were and must "over-police" themselves to ensure compliance with the vague law. *Id*. at 683. Furthermore, the lack of measurement made the law vague since plaintiffs were forced between limiting where they reside, work, and loiter to a greater extent than was required by the law or risk violating the law. *Id*. at 684-85.

Here, ROSA is similar to the law in *Doe.* The Special Condition prohibits offenders from knowingly entering into or upon any school ground. R. at 24. School ground is defined as "any area accessible to the public located within one thousand feet of the real property boundary line" R. at 45. An individual of ordinary intelligence could not determine what is a violation of the Lackawanna Special Condition and what is not. Therefore, an individual would have to over police themselves to ensure compliance with the condition. There is no indication of how the 1,000 feet is measured by either individuals abiding by the condition or enforcing it. Without further

clarification, the condition is void for vagueness and a violation of Mrs. Guldoon's Fourteenth Amendment rights.

While this Special Condition violates Mrs. Guldoon's Fourteenth Amendment rights under the vagueness doctrine, the Condition also violates her Fourteenth Amendment right to substantive due process. Even though this Court has not expressly recognized a fundamental right to intrastate travel, it has established that citizens have a "fundamental right … to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States v. Wheeler*, 254 U.S. 281, 293 (1920). Furthermore, a driver's license is a property interest that cannot be denied without due process of law. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

The Circuits are split on whether intrastate travel is a fundamental right. The Second Circuit has reasoned that it would be "meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative connotational right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir. 1971). Other Circuits have determined that restrictions on travel do not implicate a fundamental right to travel. *Doe v. City of Lafayette,* 377 F.3d 757 (7th Cir. 2004). In *Doe v. City of Lafayette*, the Seventh Circuit held that a city's ban on sex offenders from all public parks did not implicate a fundamental right to intrastate travel since the offenders were not limited in moving from "place to place within [their] locality to socialize with friends and family, to participate in gainful employment, or to go to the market to buy food and clothing." *Id.* at 770-71

Here, the Special Condition can be distinguished from the ban in *City of Lafayette*. The Special Condition imposed on Mrs. Guldoon does restrict her from moving from place to place within her locality. She lives within one mile of two schools in a rural area, thus she cannot take two of the three ways to work. R. at 3, 16-18. She also cannot travel within 1,000 feet of a school,

which has restricted her ability to travel within the locality greatly. She is not just prohibited from a place, unlike in *City of Lafayette,* but also the areas surrounding the place.

This Court should adopt the Second Circuit's reasoning that there is a fundamental right to intrastate travel. The Seventh Circuit's reasoning rests primarily on the fact that the law in question did not restrict an individual from traveling near or by a location, but simply being in a location. Along with the Second Circuit, the Sixth Circuit has recognized a fundamental right to travel in relation to drug exclusion zones. *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002).

In *Johnson*, individuals who were convicted of drug crimes brought an action challenging the constitutionality of the State statute prohibiting them from entering "drug exclusion zones." *Id*. at 488-489. The purpose of enacting the ordinance was to "enhance the quality of life in drug-plagued neighborhoods." *Id*. at 503. The ordinance excluded people from each and every public space and roadway in these "drug exclusion zones" and the State was unable to provide evidence that there were no less restrictive alternatives. *Id.* at. 503-05. The State contended that the ordinance was narrowly tailored since their other attempts failed. *Id.* at 504-05. However, the court ruled that the ordinance was a violation of the Fourteenth Amendment. *Id*.

In this case and similar to *Johnson*, the Legislature cannot show that the law is narrowly tailored. The Government's interest is to protect the public from sexually violent offenders, and this interest is well founded. R. at 19. However, the law is not narrowly tailored to meet this interest. This law forces Mrs. Guldoon to travel twenty miles to work instead of taking the quicker three mile route because it is near a school. R. at 15-16. There are many less restrictive means that can also accomplish the Government's interest. Lackawanna could make a restriction, similar to *Doe v. City of Lafayette*, restricting level two sex offenders from entering onto a school property. This restriction would allow Mrs. Guldoon to use the roadways near a school. Lackawanna could even restrict level three sex offenders from using the sidewalks near schools. The vagueness of

ROSA facilitates the infringement on Mrs. Guldoon's right to intrastate travel, which could be prevented through other means. The Legislature has failed to show that the Government's interest is narrowly tailored and could not be accomplished through less restrictive means. Thus, the Condition violates Mrs. Guldoon's Fourteenth Amendment rights.

2. The Special Condition prohibiting Mrs. Guldoon from obtaining a driver's license is not reasonably related to the Government's interest.

The Due Process Clause applies to the deprivation of a driver's license by a state. *Dixon v. Love,* 431 U.S. 105, 112 (1977). Suspension of issued licenses involves state action that adjudicates important interests of the licensees. *Id*. In such cases, licenses are not to be taken away without procedural due process as required by the Fourteenth Amendment. *Id.*

Furthermore, the pursuit of an occupation or profession is a liberty interest protected by the Due Process Clause. *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999). While it is clear that pursuing a lawful private profession or occupation is a protected right under the State and Federal Constitutions, it is equally clear that such right is not a fundamental right, requiring heightened judicial scrutiny. *Id* at 291-92. When state action does not affect a fundamental right, the proper standard of review is rational basis. *Glucksberg*, 521 U.S. at 728. Under this test, the challenged law must be rationally related to a legitimate government interest. *Id.*

In *Amunrud*, an action was brought challenging a State program that suspended driver's licenses if a parent was six months late on child support payments. *Amunrud v. Bd. Of Appeals*, 143 P.3d 571, 573 (Wash. 2006). The purpose of the law was to "create a strong incentive for those owing child support to make timely payments." *Id*. at 578. The State reasoned that to continue using their license, the individual simply needed to pay child support instead of burdening the State by "shifting the obligation to support [their] child to the State." *Id*. at 578. The court held that there was a rational relationship between the license suspension and the State's interest in enforcing child support obligations. *Id. at 579.*

In *Rushworth*, an action was brought challenging a law that required automatic suspension of driver's license for persons convicted of violating the Controlled Substance Act. *Rushworth v. Registrar of Motor Vehicles*, 596 N.E.2d 340, 341 (Mass. 1992). The court reasoned that the governmental interest was that the license suspension would serve as a deterrent to illegal drug distribution and use and would keep impaired drivers off of the road. *Id.* at 344. The court held that these were proper legislative objectives and that the law was reasonably related to those objectives. *Id*.

Unlike *Amunrud* and *Rushworth*, Lackawanna has given no reason as to how prohibiting sex offenders from obtaining a driver's license is reasonably related to protecting the public. Specifically, Mrs. Guldoon's offense did not include her use of a car. The only use of the car that occurred during the abuse is when Mrs. Guldoon drove B.B. home. R. at 7. She never drove to get him or drove him to locations where the abuse occurred. This condition burdens Mrs. Guldoon significantly since public transportation is infrequent in the rural area where she lives. R. at 15. This Special Condition forces her to ride her bicycle down a two lane road that has a speed limit of 65 miles per hour. R. at 16. Furthermore, Lackawanna must provide a reason as to why this condition is reasonably related to their interest and they have failed to do so. Therefore, the condition is not reasonably related to the Government's interest and is a violation of Mrs. Guldoon's Fourteenth Amendment rights.

II. The lower court erred by holding that ROSA does not violate the Ex Post Facto Clause.

Article I, § 10 of the United States Constitution, frequently referred to as the Ex Post Facto Clause, requires that "no state shall…pass any ex post facto law." U.S. CONST. art. I, § 10. The Ex Post Facto Clause is meant to prevent the States from enacting a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798). The Clause prohibits retroactive ("after the fact") laws and has been

interpreted to apply only to penal statutes as opposed to civil and regulatory statutes. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

This Court should apply the most recent two-part test used to analyze sex offender registration laws in *Smith v. Doe*. *Smith v. Doe*, 538 U.S. 84 (2003) The first prong asks whether the legislature meant the statute to establish civil proceedings. *Smith*, 538 U.S. at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). If it is found that the legislature intended to impose punishment, the inquiry ends and the law is considered to be Ex Post Facto. *Id.* However, if the legislature intended to enact a civil law, then the second prong asks whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. *Smith*, 538 U.S. at 92 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

Lackawanna's Registration of Sex Offenders Act (ROSA) is invalid under the Ex Post Facto Clause because the Lackawanna Legislature intended for the law to impose punishment. However, even if this Court finds that the purpose of ROSA is civil, its effect is so punitive that the Legislature's intent should be negated and the law deemed punitive in violation of the Ex Post Facto Clause. The retroactivity of ROSA will not be discussed because the District Court in this case assumed that ROSA is a retroactive law and focused solely on whether or not it is punitive. *Guldoon v. State*, 999 F. Supp. 3d 1 (M.D. Lack. 2019). Thus, this Court should reverse the lower court's determination that ROSA does not violate the Ex Post Facto Clause.

A. The Lackawanna Legislature intended for ROSA to be punitive.

The first prong that must be analyzed is whether the legislature intended to establish civil proceedings. *Smith*, 538 U.S. at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). When interpreting a stature, "the 'starting point' must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980). It is also imperative to look where the amendments are placed in a statute, its description, and the manner of enforcement when discerning legislative

intent. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Smith*, 538 U.S. at 93-94. However, it should be noted that the "civil label is not always dispositive." *Id.* Moreover, deference must be given to the stated intent of the legislature when determining whether a statute is civil or punitive. *Smith*, 538 U.S. at 93.

In *Smith*, Alaska enacted the Alaska Sex Offender Registration Act (ASORA) which contained both a registration requirement and a notification system for the State's sex offenders. *Smith*, 538 U.S. at 89-90. The notification provisions were located in the Health, Safety, and Housing Code and the registration provisions were located in the Criminal Procedure Code. *Id.* at 94. ASORA required a sex offender in jail to register with the Department of Corrections and those released to register with local law enforcement and the information was forwarded to the Alaska Department of Public Safety. *Id.* at 90. The stated purpose was to "protect the public from sex offenders.". *Id.* at 93. This Court held that even though the registration provisions were located in the Criminal Procedure Code, it was not dispositive and the stated purposes of the Legislature showed that they intended for the law to be civil and not punitive. *Id.* at 95-96.

In this case, ROSA was enacted to amend (1) the Correction Law; (2) the Penal Law; and (3) the portion of the Executive Law that describes the duties of the Board of Parole. R. at 19, 23. ROSA's stated purposes are preventing recidivism, preventing victimization, assisting local law enforcement agencies, and protecting the community. R. at 19-21. At first blush, these purposes look to be primarily civil in nature. However, ROSA goes on to say that "the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend, and *prosecute* sex offenders." R. at 19 (emphasis added). ROSA also requires offenders to provide the Division of Criminal Justice Services with certain information and "the law mandates that the *court* and the *parole board* prohibit certain dangerous convicted sex offenders from using the internet…" R. at 21 (emphasis added).

These restrictions imposed by ROSA are enforced by Criminal Justice Services, the Board of Parole, the courts and the police on a monumental level compared to *Smith*. R. at 19-21. ROSA's function and enforcement depends on the cooperation of these agencies. R. at 19-21. Unlike *Smith*, ROSA is contained in two criminal codes and the portion of the Executive Law that specifically identifies the duties of the Board of Parole. R. at 19. Also contrary to *Smith*, ROSA imposes new restrictions and procedures to be enforced by corrections and the Board of Parole as well as new Special Conditions of parole for offenders. R. at 2, 3. Furthermore, the use of the word "prosecution" suggests an effort to try, convict and eventually punish an individual for their actions. The idea that ROSA was intended to give law enforcement access to information that will help prosecute an offender and requires the assistance of the courts, the Board of Parole, Criminal Justice Services, and the police points directly to a punitive intent. Thus, the Lackawanna Legislature intended for ROSA to be punitive and the lower court erred in determining that ROSA does not violate the Ex Post Facto Clause.

B. Even if this Court finds that the Lackawanna Legislature did not intend for ROSA to be punitive, its onerous effects require the Legislature's intent be overridden and ROSA be found punitive.

Prong two states that a legislature's intent will only be overridden where the challenging party "provides 'the clearest proof' that the 'statutory scheme [is] so punitive, either in purpose or effect, as to negate the State's intention' to deem it civil." *Hendricks*, 521 U.S. at 361. To analyze the effects of a sex offender registration statute, this Court has looked at five of the seven factors laid out in *Kennedy v. Mendoza-Martinez*. *Smith*, 538 U.S. at 97; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The five factors ask whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a non-punitive purpose; or (5) is excessive with respect to its purpose. *Id.*

These factors are "neither exhaustive nor dispositive," but are "useful guideposts." *Smith*, 538 U.S. at 97.

1. The effects and structure of ROSA have been regarded in our history and traditions as punishment.

The first factor asks whether, in its necessary operation, the regulatory scheme (1) has been regarded in our history and traditions as punishment. *Id.* "A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Id.* For instance, parole is a form of punishment under the Constitution. *Riley v. N.J. State Parole Bd.*, 98 A.3d 544, 547 (N.J. 2014) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). Even though parole is "an amelioration of punishment, it is in legal effect imprisonment." *Riley*, 98 A.3d at 555 (citing *Anderson v. Corall*, 263 U.S. 193, 196 (1923)). Likewise, "community supervision for life is punitive rather than remedial." *Riley*, 98 A.3d at 555.

In *Riley*, New Jersey enacted the Sex Offender Monitoring Act (SOMA) which allowed for the Parole Board to monitor and supervise sex offenders by continuously tracking them using GPS satellites. *Riley*, 98 A.3d at 546. Riley was assigned a monitoring parole offer, had to notify his parole officer of any changes, permit his parole offer to enter his home…and the failure to comply with the conditions was punishable by up to five years in prison. *Id.* at 558. Riley challenged SOMA, arguing that the imposition of the GPS monitoring after he had already committed his crime was a violation of both the Federal and New Jersey Constitution. *Id.* at 549. The New Jersey Supreme Court agreed, stating for the first factor that "the closest analogue to SOMA is parole, and, more particularly, parole supervision for life." *Id.* at 558. The court went on to say that "the scheme, unlike the reporting and notification requirements, is similar to a form of supervised release with mandatory conditions that allows a supervising officer, such as a parole officer, to seek revocation of the release for a violation." *Id.* Because SOMA looked like parole, monitored

like parole, restricted like parole, served the general purpose of parole, and was run by the Parole Board, the court considered it to be traditional and historical punishment. *Id.*

In this case, ROSA imposes new registration requirements as well as new conditions of parole on certain offenses. R. at 2. The Special Conditions of Parole require Mrs. Guldoon to (1) register with the Division of Sex Offenders as a level two sex offender for life; (2) refrain from entering into or upon any school grounds or any other facility or institution primarily used for the care and treatment of those under the age of eighteen; (3) refrain from using the internet to access a commercial social networking website; and (4) surrender her driver's license. R. at 9-10.

Unlike *Riley*, ROSA's requirements do not just resemble parole, they *are* parole. R. at 9-10. ROSA specifically amended the Correction Law, the Penal Law, and the Executive Law which impose new Special Conditions of Parole on Mrs. Guldoon that she was not subject to when she committed her crime nor when she was sentenced. R. at 2, 19. As mentioned above, parole has been traditionally and historically regarded as punishment within our society. Thus, ROSA's effects and operation are traditional, historical punishment and require a finding by this Court as such.

2. ROSA imposes an affirmative disability or restraint on convicted sex offenders like Mrs. Guldoon.

The second factor asks whether, in its necessary operation, the regulatory scheme (2) imposes an affirmative disability or restraint. *Smith*, 538 U.S. at 97. This inquiry analyzes how the effects of the statute are felt by those subject to it. *Id.* at 99-100. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. However, "something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound." *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016). In regard to sex offender registration statutes, "those irons are always in the background since failure to comply with [the] restrictions [carry] with it the threat of serious punishment, including imprisonment." *Id.*

In *Letalien*, Maine enacted the Sex Offender Registration and Notification Act of 1999 (SORNA) which increased the registration duration from fifteen years to life for "sexually violent predators." *State v. Letalien*, 985 A.2d 4, 10 (Me. 2009). SORNA also required Letalien to report in person to his local law enforcement agency every ninety days to verify his domicile, place of employment, residence, and college or school being attended, to be fingerprinted and to provide a photograph of himself. *Id.* The Legislature added a provision that a second failure to comply was a Class C offense and a failure to comply more than twice was a Class B offense. *Id.* at 11.

When analyzing whether SORNA imposed an affirmative disability or restraint, the court held that "these provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies… place substantial restrictions on the movements of lifetime registrants and may work an impractical impediment that amounts to an affirmative disability." *Id.* at 18. The court also went on to note that the restrictions imposed by SORNA were "undoubtedly a form of significant supervision by the state… [which] imposes a disability or restraint that is neither minor nor indirect." *Id.*

In this case, as a level two offender, Mrs. Guldoon is subject to extreme restrictions that amount to an affirmative restraint. Even though she is released from prison on parole and not in irons, the irons are always in the background looming because any misstep and she can have her parole revoked and be sent back to prison. R. at 44. Like *Letalien*, Mrs. Guldoon is required to register for the rest of her life and the failure to do so can result in imprisonment. R. at 35, 44. Though not applicable to Mrs. Guldoon, ROSA has the exact requirement as *Letalien* that level three offenders must report in person every ninety days for life. R. at 35. ROSA even takes things one step further by prohibiting sex offenders from driving a car for at least twenty years, using commercial social networking sites, and traveling within 1,000 feet of a school. R. at 3, 24-25, 44. Furthermore, ROSA has made it impossible for Mrs. Guldoon to seek or to apply to most

employment opportunities, hampers her ability to find or maintain employment since she can only travel on foot or by bicycle, and has made her a virtual prisoner in her own home since she and her family live within one mile of two schools. R. at 3. These restrictions extend far past "minor and indirect." Thus, this Court should find that ROSA imposes an affirmative disability or restraint on Mrs. Guldoon and other convicted sex offenders.

3. ROSA promotes the traditional aims of punishment, namely, deterrence and retribution.

The third factor asks whether, in its necessary operation, the regulatory scheme (3) promotes the traditional aims of punishment. *Smith*, 538 U.S. at 97. "Deterrence" is the act or process of discouraging certain behavior, particularly by fear; especially as a goal of criminal law, the prevention of criminal behavior by fear of punishment. *Deterrence*, BLACK'S LAW DICTIONARY (5th ed. 2016). "Retribution" is punishment imposed for a serious offense. *Retribution*, BLACK'S LAW DICTIONARY (5th ed. 2016).

In *Starkey*, Oklahoma implemented amendments to the Oklahoma Sex Offender Registration Act (SORA) which assigned risk levels to sex offenders which were based solely on the criminal statute that they were convicted under. *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004, 1010 (Okla. 2013). Before the new SORA amendments were enacted, Mr. Starkey was only required to register for 10 years, but after the amendments he was required to register for life. *Id.* Examining the third factor of the five-part test, the court found that the SORA amendments "promote[d] deterrence through the threat of negative consequences, for example, eviction, living restrictions and humiliation." *Id.* at 1027. The court also found that the amendments promoted retribution because Starkey's registration term was extended from 10 years to life, without any "triggering act or alleged violation of the law." *Id.* Similarly, in addressing how SORA used past crime as a touchstone, the court noted that "when a legislature uses prior convictions to impose

burdens that outpace the law's stated civil claims, there is room for serious argument that the ulterior purpose is to revisit past crime, not prevent future ones." *Id.*

Here, ROSA promotes deterrence through negative consequences by, for example, threatening that any violation permits a recommendation that parole be revoked and it allows for extensive humiliation by the publishing of an offender's status on the internet. R. at 38, 44. Unlike *Starkey*, the enactment of ROSA imposed an even more burdensome registration requirement for Mrs. Guldoon. R. at 9. Mrs. Guldoon went from not having to register *at all* to having to register *for life* as a level two sex offender. R. at 8-9, 35. Like *Starkey*, this is retributive because Mrs. Guldoon committed no triggering act after she had already been sentenced that would warrant the implementation of a registration period. R. at 2. In fact, Mrs. Guldoon was in prison when ROSA was enacted and imposed this requirement. R. at 2. Furthermore, ROSA requires the Board of Examiners of Sex Offenders to determine the offender's level by using, for example, criminal history, whether the offender served the maximum term, whether the offender committed the felony sex offense against a child, whether the offense involved the use of a weapon, and more. R. at 37. These factors, along with others, require using Mrs. Guldoon's past crime as a touchstone for determining the level she should be assigned, which indicates that ROSA is punitive. Thus, this Court should find that ROSA promotes the traditional aims of punishment, in this case, deterrence and retribution.

4. ROSA does not have a rational connection to a non-punitive purpose and is excessive with respect to its purpose.

The fourth and fifth factors are frequently analyzed together and they ask whether, in its necessary operation, the regulatory scheme (4) has a rational connection to a non-punitive purpose or (5) is excessive with respect to this purpose. *Smith*, 538 U.S. at 97. A statute's rational connection to a non-punitive purpose is a "most significant" factor in determining whether a statute's effects are punitive. *Id.* at 102. The excessiveness inquiry is "not an exercise in

determining whether the legislature has made the best choice possible to address the problem…. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective." *Id.* at 105. "The less rational a restriction's connection to its stated purpose, the more excessive it will be in addressing that purpose." *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951, 959 (E.D. Wis. 2017).

In *Does #1-5*, Michigan amended its Sex Offender Registration Act (SORA) which prohibited sex offenders from living, working, or loitering within 1,000 feet of a school, divided registrants into tiers based on dangerousness without an individual assessment, and required registrants to personally appear to update their information. *Does #1-5*, 834 F.3d at 698. Looking at whether there was a rational relation to a non-punitive purpose, the court noted that there was scant support for the proposition that SORA accomplished its stated goals. *Id.* at 704. The court stated that one statistical report found that laws like SORA "actually increase the risk of recidivism, probably because they…[make] it hard for registrants to find and keep a job, find housing, and reintegrate into their communities." *Id.* at 704-05. Because the parties weren't able to point to anything that showed SORA's beneficial effect on recidivism rates, the court held that the SORA amendments had no rational connection to the non-punitive purpose of preventing recidivism. *Id.* at 705.

Focusing on the excessiveness inquiry the court observed that "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face…. The parties point to no evidence…that the difficulties the statute imposes on registrants are counterbalanced by any positive effects." *Id.* Likewise, the in-person registry requirement appeared to have no relationship to public safety whatsoever. *Id.* All in all, the court held that the punitive effects of SORA far exceeded even a generous assessment of their salutary effects. *Id.* Thus, not only did SORA fail to

have a rational connection to its stated purpose, but it was also excessive in regard to its purpose when assessing the fifth factor. *Id.*

In this case, and unlike *Does #1-5*, ROSA allows for an individual assessment for each offender. R. at 37-38. However, if the offender is classified as a level two risk and has not been designated a sexual predator, a sexually violent predator, or a predicate sex offender, like Mrs. Guldoon, they must wait thirty years before they can petition to be relieved of any further duty to register. R at 40-41. On the other hand, like *Does #1-5*, ROSA prohibits sex offenders from traveling within 1,000 feet of a school and requires in person registration. R. at 3, 35. Also, the Lackawanna Legislature acknowledges that studies indicate that access to employment and education greatly reduces the risk of recidivism by ex-offenders. R. at 21. However, they fail to point to any statistics that show the restrictions imposed by ROSA actually have an effect on recidivism rates. To the contrary, ROSA has actually made it impossible for Mrs. Guldoon to seek or to apply to most employment opportunities, has interfered with her ability to find and maintain employment, and has made her a virtual prisoner in her own home. R. at 3. Thus, ROSA does not have a rational connection to a non-punitive purpose.

Similarly, ROSA is excessive with respect to its purpose to reduce recidivism and protect the community. Like *Does #1-5*, the Lackawanna Legislature has failed to show that the negative effects of ROSA counterbalance its positive effects. Because of ROSA, Mrs. Guldoon is barred from her chosen career of teaching since she cannot approach within 1,000 feet of any school, she had to forgo acceptable job opportunities because she is no longer allowed to drive, and to get to work she has to take a 20 mile route each way because the fastest and second fastest routes pass by a school. R. at 15-16. She is forced to ride a bicycle along a 65 mile-per-hour highway to get to work no matter the temperature, which can sometimes be less than 30 degrees, and since she cannot access any commercial networking site, her family is also barred since they live in the same home.

R. at 15-16. These burdens are excessive when compared to the stated purposes of the Lackawanna Legislature, which satisfies factor five. Thus, this Court should reverse the lower court's ruling and hold that ROSA violates the Ex Post Facto Clause because even if the Lackawanna Legislature's intent was not punitive, its effects are so punitive that it warrants the Legislature's intent be negated and ROSA be found punitive.

CONCLUSION

For these reasons, this Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and enter a decision in favor of Mrs. Mary Guldoon on both claims.

Respectfully Submitted,

Date: March 9, 2019

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ATTORNEYS FOR PETITIONER